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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/526,850	03/02/2005	Colin Christopher Giles	J3685(C)	9359

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EXAMINER	
FOLEY, SHANON A	
ART UNIT	PAPER NUMBER
1619	

MAIL DATE	DELIVERY MODE
05/19/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/526,850	GILES ET AL.	
	Examiner	Art Unit	
	SHANON A. FOLEY	1619	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *11 June 2008*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-7,9-16,18 and 19* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1- 7,9-16,18 and 19* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

The Group and/or Art Unit of your application has changed. To aid in correlating any papers for this application, all further correspondence regarding this application should be directed to Group Art Unit 1619, Examiner Foley.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on June 11, 2008 has been entered.

Applicant's response and arguments to the prior art of record has been considered, but is rendered moot in view of newly identified pertinent prior art required to be made of record.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-5, 14 and 15 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 5, 8, 12, 13 and 17-19 of copending Application No. 10/497,889.

Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims include a process for preparing a hair treatment in an aqueous dispersion comprising identical ingredients, with a similar particle size and ratio of ingredients. Therefore, the subject matter claimed is not patentably distinct between the two applications.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-5, 7 and 9-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Murphy et al. (US 4,983,418).

Murphy et al. teach a hair treatment conditioning composition comprising dispersion of hectorite, a particularly preferred cationic quaternary surfactant, quaternarium-18 (which is also a preferred cationic surfactant according to paragraph [0078] of the instant disclosure, therefore meeting the formula recited in the claim) and a silicone elastomer. See column 9, lines 3-5, claims 1-7 and 15-21. Murphy et al. also teach a method of treating hair by applying the

composition to the hair or scalp, see column 8, lines 18-32. Since the hair conditioner of Murphy et al. is applied to hair to maintain a temporary styling, the conditioner can be removed by a rinse with water. Murphy et al. also teach a method of preparing the hair treatment composition by dispersing the composite particles and combining the dispersion with the remaining treatment ingredients without first drying the aqueous dispersion of particles, see column 8, lines 3-12. Murphy et al. also teach that the weight percent of the hectorite present is between 0.05 to 5%, the percent weight of the silicone elastomer is between 0.05 to 10% claims 1 and 15.

Although Murphy et al. do not teach the total percent weight of the composite particles of hectorite, quarternarium-18 and silicone elastomer or the median diameter of the particle size, it would have been prima facie obvious to a person of ordinary skill in the art at the time the invention was made to have determined the particle sizes at which the composite particles are most effective. The result-effective adjustment in conventional working parameters (e.g., determining the appropriate weight percentages, particle sizes, weight ratios, etc. within the composition) is deemed merely a matter of judicious selection and routine optimization, which is well within the purview of the ordinary artisan.

Claims 6, 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Murphy et al. as applied to claims above, and further in view of Midha et al. (USPgPub 2002/0034486).

Instant claim 6 requires that the charged organic molecule is the cation of alkyl trimethyl ammonium chloride, wherein the alkyl chain comprises 12 to 22 carbon atoms. Instant claims 18 and 19 state that the hair benefit agent is a finely divided solid comprising zinc pyrithione.

See the teachings of Murphy et al. above. Murphy et al. do not teach or suggest alkyl trimethyl ammonium chloride, wherein the alkyl chain comprises 12 to 22 carbon atoms or zinc pyrithione.

However, Midha et al. teach that the alkyl trimethyl ammonium chloride may have an alkyl chain of at least 16 carbon atoms, see paragraph 0191. It would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have substituted the alkyl trimethyl ammonium chloride of Midha et al. for the quarternarium-18 of Murphy et al. with a reasonable expectation of success since both ingredients are functionally equivalent cationic surfactants used to condition hair, see paragraph 0190-0191 and claim 30 of Midha et al.

Midha et al. also teach the inclusion of zinc pyrithione, see paragraphs 0259 and 0264.

One of ordinary skill in the art at the time the invention was made would have been motivated to have incorporated the zinc pyrithione of Midha et al. in the hair conditioner of Murphy et al. to treat dandruff, see paragraph 0264 of Midha et al. One of ordinary skill in the art at the time the invention was made would have had a reasonable expectation of success for combining the zinc pyrithione of Midha et al. into the composition of Murphy et al. since both Midha et al. and Murphy teach hair conditioners comprising functionally equivalent cationic surfactants (alkyl trimethyl ammonium chloride and quarternarium-18); hectorite, see paragraph 0023 of Midha et al.; and silicones, see paragraphs 0022, 0041, 0055 and 0128 of Midha et al.

Therefore, the invention would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, absent unexpected results to the contrary.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to SHANON A. FOLEY whose telephone number is (571)272-0898. The examiner can normally be reached on M-F 5:30 AM-3 PM, alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael P. Woodward can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Shanon A. Foley/
Primary Examiner
Art Unit 1619